FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]136

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROWLAND L. DAVIS, JR.,
140 Cedar Street,
New York 6, New York,
WALTER L. HILL, JR.,
507 Linden Street,
Scranton 3, Pennsylvania,
JOSEPH C. KEEDER,
507 Linden Street,
Scranton 3, Pennsylvania,
Attorneys for Petitioner

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
John D. Vanston, Lackawanna County Representative, Court House, Scranton 3, Pa.

INDEX

	Page
Petition for Writ of Certiorari:	
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	11

TABLE OF CITATIONS

Anderson-Tully Co. v. United States, 189 F. 2d 192	6
Bibb County, Ga. v. United States, 249 F. 2d 228	6
Lynch v. United States, 292 U.S. 571, 78 L. Ed. 1434	9
Schnebbe v. Sandt Estate, 365 Pa. 287, 74 Atl. 2d 404	8
Searl v. School District, 133 U.S. 553, 33 L. Ed. 740	6
United States v. Certain Parcels of Land in Warren County, Va., 90 F. Supp. 27	10
United States v. Five Parcels of Land, 180 F. 2d 75	6
United States v. Smith, 110 F. 338	6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No.

The Delaware, Lackawanna and Western Railroad Company,

Petitioner

vs.

United States of America,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Delaware, Lackawanna and Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered February 26, 1959 (App. 10), together with the underlying decision of that Court dated February 26, 1959 (App. 1). Rehearing denied April 2, 1959 (App. 13). These reversed judgment of the United States District Court for the Middle District of Pennsylvania for the value of petitioner's property taken in condemnation by the United States of America.

OPINIONS BELOW

The report of the Commission appointed by the District Court to determine fair value of the property taken is printed in joint appendix filed on appeal to the Court of Appeals at page 364a. The opinion of the District Court printed in the joint appendix at page 412a is reported in 154 F. Supp. 770. The opinion of the United States Court of Appeals printed in appendix hereto at page 1 is reported in Advance Sheets April 27, 1959, 264 F. 2d 112.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1959 (App. 10). Rehearing denied April 2, 1959 (App. 13). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and under the Fifth Amendment of the Constitution of the United States.

QUESTION PRESENTED

In condemnation brought by the United States, is the owner of the land and buildings taken deprived of just compensation where prior to the taking the owner had leased the premises to a private business corporation engaged in producing and selling ordnance to the United States Army and lessee had, pursuant to its covenants in the lease, repaired, renovated and altered the property at lessee's cost when the owner is not allowed to recover the value resulting from lessee's repairs, renovations and alterations because the United States had reimbursed the lessee for lessee's cost of making them?

STATEMENT OF THE CASE

On January 15, 1953, The Delaware, Lackawanna and Western Railroad Company, owner in fee of the land and buildings here involved, leased the same to the United States Hoffman Machinery Corporation, a private business corporation (Joint App. 318a). Hoffman, the lessee, then had or expected to have contracts with the United States Government for production of artillery shells (Joint App. 342a). The lease provided, inter alia, that lessee would occupy and use the premises for this and other heavy manufacturing purposes (Article *Tenth*, Joint App. 330a); would at its sole cost and expense make all necessary repairs and keep the premises in good repair (Article *Nineteenth*, Joint App. 336a); at its sole cost and expense do the work of renovation and alteration required to adapt the premises to its uses (Articles *Eighth* and *Ninth*, Joint App. 328a-329a).

On August 24, 1954, during Hoffman's occupancy under the lease, the United States condemned and took the leased premises. Between the date of leasing and the date of taking, Hoffman, the tenant, pursuant to the express conditions of the lease had repaired, rehabilitated and altered the buildings. The material used in the work of repairs, restoration and alteration were so incorporated in the premises as to be an integral part of the physical structures. For example, deteriorated roofs, floors, window frames and plumbing facilities were torn out and replaced (Joint App. 202a-209a; Deft's. Ex. No. 5, 350a-352a). On April 15, 1954, upon renewal of the lease Lackawanna,

lessor, waived any right that it might have under the lease to require Hoffman, the lessee, to remove any of the repairs or alterations at the end of the lease term (Joint App. Deft's Ex. No. 5, 350a-352a).

At the trial of the issue of fair value it was shown that tenant repairs, rehabilitations and alterations had given added value to the property (Joint App. 160a, 263a, 373a); that Hoffman, the tenant, had contracted for this work and had paid its contractors (Joint App. 202a-209a); that the United States had reimbursed the tenant for this expense pursuant to a "facilities" contract (not in evidence) between Hoffman and the United States (Joint App. 218a-220a).

Lackawanna, the landowner, claimed that it was entitled to the value of the property as of the date of taking which included the value resulting from tenant repairs, renovations and alterations. The United States claimed that because it had reimbursed Hoffman, the lessee, for the cost thereof it should not upon condemnation be required to pay for the resulting value. The District Court following long established principles of Pennsylvania landlord and tenant law and long established principles of Federal law of condemnation held that the value resulting from the tenant's repairs and alterations was the property of the landowner by virtue of the contract of lease and the Government having taken it must pay for it. The Court of Appeals reversed, holding that the United States, by reimbursing the tenant, had acquired an interest in the property so that on condemnation the value to which the landowner was entitled was the value before the tenant repaired and altered the property.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has denied to petitioner compensation for a value expressly contracted for as part of the consideration for leasing petitioner's property to a lessee for lessee's use in carrying out its business for profit. The case is important not only to every individual whose property and private contracts are taken by Government but to all who supply property to a private business engaged in supplying the needs of Government.

In denying petitioner compensation for the benefits of petitioner's contract the court below has expressly rejected as erroneous the decision of the Court of Appeals for the Fifth Circuit in the case of *United States v. 5 Parcels of Land in Harris County, Texas*, 180 F. 2d 75 (certiorari denied, 340 U.S. 812), wherein the landowner was held entitled in condemnation by the United States to a value resulting from dredging, levelling and filling the land, done by a lessee who was paid by the United States for so doing.

In declining to follow the decision in Harris the court below lumped together as similar, in fact and consequence, such claims as were asserted by landowners in *Searl v. School District*, 133 U.S. 553, 33 L. Ed. 740; *Bibb County v. United States*, 249 F. 2d 228 (5 Cir. 1957); *Anderson-Tully Co. v. United States*, 189 F. 2d 192 (5 Cir. 1951); *United States v. Smith*, 110 F. 338, with such as were made in Harris and by petitioner here. The last cited cases are typical of many cases where landowners unsuccessfully claimed the value of buildings, railroad tracks, life saving stations, power plants and the like brought on and added to the land, but there is certainly a distinction between such sort of claims and the claims made in Harris and by

petitioner here. Petitioner's claim here was simply for the value of petitioner's land and buildings which petitioner had leased to Hoffman as increased by Hoffman's fulfillment of its express covenants to repair and restore petitioner's property. Petitioner made no claim here for the new buildings, power plant and other heavy installations of facilities and machinery brought on to and affixed to petitioner's property, nor was any such value allowed (Joint App. 384a-385a and 418a). The court below in denying the petitioner the full value of the reversion said:

> "Thus the intention of the parties is abundantly clear that the lessor railroad was entitled to receive back at the term's end no more than what it delivered at the beginning. Nothing would have prevented the lessee from removing all the improvements made to the property during the leasehold term so long as the property was returned at term's end in substantially the condition it was delivered. No accessions to the property during the term would give the railroad ownership of more than it had in the beginning and was entitled to at the end. That the lessee for practical considerations of cost would not have removed the new roof and windows, torn up new floors and paving, nor taken out new plumbing all in order to effect a restoration to the original state is irrelevant to this proceeding. What the reversioner would in all probability have gotten at the end of the term is not entirely pertinent in evaluating the property; rather, it is what the reversioner was entitled to as of right at the end of the term." (App. 7)

Thus, reducing lessee's express covenants to a gratuity, the benefit of which petitioner would have got only because the

tenant chose not to spend the money to replace the new roofs with old and generally return petitioner's property to its former condition of disrepair. The result is reached by a finding of intent in certain portions of Article *Twenty-Ninth* of the lease (Joint App., Deft's. Ex. No. 1, 339a), without reference to the express covenants of lessee provided for in Articles *Eighth* (Joint App. 328a), *Ninth* (Joint App. 329a) and *Nineteenth* (Joint App. 336a). It seems clear enough that removal of new buildings, heavy installations of machinery and facilities could result in structural damage to petitioner's property and that the lessee agreed to restore any such damage. But contrary to the finding of the Commission as to intent (Joint App. 378a) and of the District Court (Joint App. 425a) and indeed contrary to the long settled law of Pennsylvania that regardless of intent chattels so incorporated in a building as to be an essential and integral part thereof and which cannot be removed without material damage to themselves or to the building become real estate when so incorporated, *Schnebbe v. Sandt Estate*, 365 Pa. 287, 74 Atl. 2d 104, the Court below has found an intent that lessee have a right to rip out of petitioner's buildings the promised repairs.

But the opinion below is essentially based on the proposition that the United States by reimbursing Hoffman, petitioner's lessee, acquired an "interest" in petitioner's property prior to condemnation, which "interest" introduced into the condemnation proceedings "an unanticipated and disrupting influence into the previously existing relationship" (App. 8). The path of due process followed in thus transferring from the petitioner to the United States the value of the reversion as increased by

lessee's compliance with the terms of the lease is not disclosed. The value of petitioner's property was also increased by the fact that it was occupied under a lease requiring lessee to pay rent and taxes. It can scarcely be supposed that petitioner could be deprived of this value without compensation had the United States reimbursed lessee for these expenses. Yet a promise to pay rent and a promise to repair and restore at lessee's expense are no different for both are considerations paid for use and occupancy. Putting the United States "in the shoes of the lessee for some purposes at least" (App. 8) accomplishes no more than to obligate the United States to do exactly what Hoffman had agreed to do.

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central P. R. Co., 118 U.S. 235, 238, 30 L. Ed. 173, 174, 6 S. Ct. 1038; United States v. Northern P. R. Co., 256 U.S. 51, 64, 67, 65 L. Ed. 825, 828, 830, 41 S. Ct. 439."
>
> *Lynch v. United States*, 292 U.S. 571, at p. 579, 78 L. Ed. 1434, at p. 1440.

When the United States chose to pay the consideration asked for use and occupancy rather than take the property it is not, when it later condemns, paying again for the same thing.

> "Counsel for the Government now urges that 'if the Commissioners' award is allowed to stand the government is placed in the ridiculous position of hav-

ing to pay not only for the land taken but also for the improvements placed on the land by the United States for the use of the United States'. A brief answer to this argument is that it ignores entirely the obligation which the Government undertook with respect to the improvements when it entered into the lease. No doubt had the Government acquired the fee in this tract in 1944, when it was unimproved, the cost of it would have been much less than it is now required to pay. But instead it decided to lease the land under a contract whereby, in consideration for its use, it enhanced the value of the property."

United States v. Certain Parcels of Land in Warren County, Va., 90 F. Supp. 27, 34.

What was done here by petitioner, by Hoffman and by the United States was done purposefully. There is no fortuitous event involved. Application in this context of rules designed to prevent unjust enrichment or a windfall can be justified only if the sovereign rights of government are something more than heretofore supposed and the sovereign rights of the governed something less.

CONCLUSION

The questions involved in the decision of the Court of Appeals are important. The United States contracts with a great many private businesses which in turn contract with a vast number of other private parties. The consequences of such contractual relationships are important to all of them. The taking of private property for the uses and purposes of Government is common and widespread. The decision of the Court of Appeals is disruptive of contractual rights and obligations and such a denial of just compensation as to merit review by this Court.

Respectfully submitted,

ROWLAND L. DAVIS, JR.,
140 Cedar Street,
New York 6, N. Y.,
WALTER L. HILL, JR.,
507 Linden Street,
Scranton 3, Pennsylvania,
JOSEPH C. KREDER,
507 Linden Street,
Scranton 3, Pennsylvania,
Attorneys for Petitioner.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]136

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROWLAND L. DAVIS, JR.,
140 Cedar Street,
New York 6, New York.
WALTER L. HILL, JR.,
507 Linden Street,
Scranton 3, Pennsylvania.
JOSEPH C. KREDER,
507 Linden Street,
Scranton 3, Pennsylvania,
Attorneys for Petitioner

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX TO APPENDIX

	Page
I. Opinion of United States Court of Appeals for the Third Circuit	1
II. Judgment of Court of Appeals Thereon	10
III. Order of Court of Appeals Extending Time for Filing Petition for Rehearing	12
IV. Order of Court of Appeals Denying Rehearing	13

I.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FEBRUARY 26, 1959

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 12,575

United States of America,

Appellant

v.

Delaware, Lackawanna & Western Railroad Company

Appeal From the United States District Court for the Middle District of Pennsylvania

---

Argued November 17, 1958

Before Biggs, *Chief Judge*, and McLaughlin and Kalodner, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 26, 1959)

By McLaughlin, *Circuit Judge*.

This is a land condemnation case which on appeal presents three questions of law. The property involved is 15.3 acres in the heart of Scranton, Pennsylvania and was

formerly used by the defendant railroad for repair and upkeep of its steam locomotives. On the land there are four main structures with from 450,000 to 480,000 square feet of space, including basements and mezzanines.

During the Korean War the United States contracted with the United States Hoffman Machinery Corporation for the production of large caliber shells. The arrangement was in the form of a supplies contract calling for the actual production of the shells and a facilities contract by which Hoffman undertook to obtain the use of a heavy industrial property which could be adapted at government expense to the required use. Hoffman's profit was to be realized solely on the production contract.

The property involved was subsequently leased in January 1953 by Hoffman from the D. L. & W. R.R. for a term of fifteen months at a rental of $500,000 with annual options for four years to renew at the end of each term for another year at a rent of $400,000 annually. Hoffman thereafter effected substantial repairs and improvements to the property in adapting it for the required use; the expert testimony variously estimated that the value of the premises was thereby enhanced by between $250,000 and $300,000. The United States reimbursed Hoffman for all these repairs and improvements under the terms of the facilities contract.

In August 1954 this condemnation proceeding was initiated by the United States; a jury trial was demanded. The defendant, however, moved for the appointment of a commission which the district court granted. The commission held hearings at which both sides introduced testimony primarily with regard to valuation of the property by experts. Following these the commission with findings of

fact, conclusions of law and an opinion largely summarizing the testimony decided that the defendant property-owner was entitled to $1,720,700. The district court affirmed this and overruled the objections of both parties.

I.

The first question we have to decide is whether the district court erred in referring the matter to a commission rather than granting the jury trial requested by the government. Rule 71 A (h) of the Federal Rules of Civil Procedure affords the choice.[1] From the wording of the rule it is apparent that the choice is vested in the discretion of the court. The circumstances of the rule's genesis, which are set out both in 28 U.S.C.A. (Supp. 1957) following its text and in 7 Moore's Federal Practice, ¶¶ 71 A.01-71 A.08; 71 A.90, confirm this.

Only one case from a Court of Appeals has reversed the reference to a commission, see United States v. Theimer, 199 F. 2d 501 (10 Cir. 1952), although the Second Circuit has twice in connected cases expressed its disapproval of a reference. See United States v. Vater, 259 F.

---

[1] "Rule 71 A. Condemnation of Property • • •

(h) If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it • • •"

2d 667 (2 Cir. 1958); United States v. Bobinski, 244 F. 2d 299 (2 Cir. 1957). Cases from the Fourth,[2] Fifth,[3] Eighth,[4] and Tenth[5] Circuits, however, have affirmed references under widely varying conditions. All these citations, plus those reported decisions of the district courts on the problem[6] (most of which made the reference) say nearly all that can be said on the point. Since the choice is so largely within the discretion of the district court, since the character of the property involved is complex, and since the evaluation thereof is only to be fairly arrived at by a method involving complicated comparisons of numerous other properties, we are unwilling to say that the court erred in ordering the case to a commission.[7] However, we do not lose sight of the fact that among other things a

---

[2] United States v. Cunningham, 246 F. 2d 330 (1957).

[3] United States v. Buhler, 254 F. 2d 876 (1958).

[4] United States v. Chamberlain Wholesale Grocery Co., 226 F. 2d 492 (1955).

[5] United States v. Waymire, 202 F. 2d 550 (1953); United States v. Wallace, 201 F. 2d 65 (1952).

[6] United States v. Interests in Property in Cascade County, Montana, 163 F. Supp. 518 (Mont. 1958); United States v. 5,678 Acres of the Crow Reservation, Montana, 162 F. Supp. 108 (Mont. 1958); United States v. Fairfield Gardens, Inc., 21 F.R.D. 370 (N.D. Cal. 1958); United States v. Certain Tracts in the City of Richmond, California, 21 F.R.D. 389 (N.D. Cal. 1957); United States v. 4.16 Acres in the Counties of El Dorado and Placer, California, 20 F.R.D. 89 (N.D. Cal. 1957); United States v. 1,584 Acres in Beaufort County, South Carolina, 141 F. Supp. 720 (E.D. S.C. 1956); United States v. 4.43 Acres in Tarrant County, Texas, 137 F. Supp. 567 (N.D. Tex 1956); United States v. 1146.32 Acres of Land, 132 F. Supp. 681 (S.D. Tex. 1955); United States v. 1,617 Acres in Johnson County, Iowa, 18 F.R.D. 96 (S.D. Iowa 1955); United States v. 2,793 Acres in Aiken, Barnwell and Allendale Counties, South Carolina, 114 F. Supp. 76 (E.D.S.C. 1953).

[7] The opinion below appears at 17 F.R.D. 337 (M.D. Pa. 1955).

reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expense, in this instance to the government for accruing interest.

II.

The second question presented is whether the United States was prejudiced by admission of evidence as to the terms of the lease between Hoffman and the defendant. It is asserted that the lease represented special value to the condemnor and is not evidence of market value and that since the commission failed to indicate the relevancy which it attributed to this evidence, the United States was prejudiced. Even if it be assumed *arguendo* that the lease in effect was not evidence of fair market value we think it is clear that the commission recognized this. The only witness to rely on the annual rental was Doud, one of the defendant's three experts. By employing the usual income capitalization rates of 10% to 12% for this type of property, he arrived at an estimated value of from $3,330,000 up to $4,000,000, depending on which capitalization rate was used. Hinerfeld, defendant's second expert, took the annual rental as a starting point, but recognizing it as peculiar, capitalized it at 18% rather than at the usual rates. He also applied the capitalization method to what he considered a fair rental value for the property at the more usual rate of 10%. By these alternatives for the same method he arrived at a value of $2,250,000 for the property. Defendant's third witness, Gordon, also set up what was in his judgment a fair annual rental and capitalized this at 10% to arrive at a valuation of $2,250,000 also. Potter, the government's lone expert, set up a hypothetical fair rental value by a comparative method similar to that employed by Hinerfeld and Gordon, concluding that

it would be $116,200; making allowance for the portion of that value contributed by the land and capitalizing the remainder at an annual return of 10% discounted for an estimated life of the buildings for twenty-five years, the witness ultimately arrived at a value for the property of $1,092,000. From this review it seems plain that the commission followed three of the four witnesses in attributing no relevancy to the annual rental afforded by the lease.

III.

The final question is whether there shall be included in the value of the land at the date of taking the enhancement wrought through the repairs and improvements accomplished under the facilities contract. The district court agreed with the commission that the United States should pay for taking these since they had been incorporated into and had become an integral part of the realty, even though they had been made at government expense originally.

Whatever the rights of the parties concerned with the transaction might be in the absence of provisions in the lease, it is unquestionable that expressed intentions and understandings will govern. The twenty-ninth provision of the lease declares that upon termination Hoffman will vacate the premises and surrender them in good order, condition, and repair, reasonable wear and tear excepted. It further provides that Hoffman will on termination remove

> "* * * all other property (including property furnished by the United States government * * *) placed, installed or constructed upon or affixed to the demised premises by Lessee * * *
>
> "Anything herein contained to the contrary notwithstanding, Lessee recognizes that the removal of

property furnished by the United States government may result in structural damage to the demised premises, and accordingly hereby agrees that if the removal of any such property shall cause structural damage to the demised premises, Lessee will repair the same so as to put the premises into either substantially the condition existing prior to the installation of such removed property, reasonable wear and tear excepted, or in equally good serviceable condition * * * "

Thus the intention of the parties is abundantly clear that the lessor railroad was entitled to receive back at the term's end no more than what it delivered at the beginning. Nothing would have prevented the lessee from removing all the improvements made to the property during the leasehold term so long as the property was returned at term's end in substantially the condition it was delivered. No accessions to the property during the term would give the railroad ownership of more than it had in the beginning and was entitled to at the end. That the lessee for practical considerations of cost would not have removed the new roof and windows, torn up new floors and paving, nor taken out new plumbing all in order to effect a restoration to the original state is irrelevant to this proceeding. What the reversioner would in all probability have gotten at the end of the term is not entirely pertinent in evaluating the property; rather, it is what the reversioner was entitled to as of right at the end of the term. With most respect we think that the Fifth Circuit panel which decided United States v. Five Parcels of Land in Harris County, Texas, 180 F. 2d 75 (1950), one judge dissenting, reached an erroneous result by failing to take this consideration into account, and so we decline to follow that decision.

So far we have treated the problem as though it were simply one of deciding between the lessor and the lessee which of them was entitled to payment for the taking of certain property. But where the government is itself the lessee or can be put into the shoes of the lessee for some purposes at least—as here it can be by reason of its contract to indemnify Hoffman for the costs of making improvements—we would necessarily reach the same result despite the absence of expressed intention in the lease. For even though the improvements were to be considered as fixtures incorporated into the realty—being so regarded either because of a failure by the parties to express their intentions thereto or because of actually expressed intention in the lease—the law of fixtures would not ultimately control the special considerations of a condemnation case where the government had caused the improvements to be made originally. If the common law learning concerning fixtures were inflexibly applied the result would frequently be a windfall to the property-owner and conversely would be tantamount to requiring the government to pay twice for the same thing. See Bibb County, Georgia v. United States, 249 F. 2d 228 (5 Cir. 1957); United States v. Smith, 110 F. 338 (E.D.N.Y. 1901). The compensation to be awarded must not only be just to the owner but it must be just to the public who is to pay for it. Searl v. School District No. 2 in Lake County, 133 U.S. 553 (1890).

Where the government has an interest in the property prior to condemnation, the condemnation proceedings introduce an unanticipated and disrupting influence into the previously existing relationship. The adjustment which it is the function of the courts to make at this stage is not aided by reference to the law of fixtures. When condemna-

tion proceedings must also determine the extent to which pre-existing government interests in the property affect the owner's right to compensation the rules regarding fixtures and movables are inapposite. Those rules were formulated in the light of what was fair between the landlord and tenant who had failed to express their intention concerning property brought onto the premises by the tenant; cf. Anderson-Tully Co. v. United States, 189 F. 2d 192, 196 (5 Cir. 1951); they have no direct application in condemnation proceedings where the government already has an interest in the property.

For the reasons stated we conclude that the defendant property-owner is not entitled to receive payment for the enhancement to the value of the premises effected by Hoffman after the lease was entered. The judgment will be reversed and the cause remanded for further proceedings consistent with this opinion.

II.

JUDGMENT OF COURT OF APPEALS THEREON ENTERED FEBRUARY 26, 1959

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 12,575

United States of America,
Appellant

vs.

15.3 Acres of land, more or less, situate in the City of Seranton, County of Lackawanna and Commonwealth of Pennsylvania; and Delaware, Lackawanna and Western Railroad Company

---

On Appeal From the United States District Court for the Middle District of Pennsylvania

---

Present: Biggs, *Chief Judge*, and McLaughlin and Kalodner, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

Judgment

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded for further proceedings consistent with the opinion of this Court.

Attest:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

February 26, 1959

III.

ORDER OF COURT OF APPEALS EXTENDING TIME FOR FILING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 12,575

United States of America,

Appellant

v.

Delaware, Lackawanna & Western Railroad Company

Present: Biggs, *Chief Judge*, and McLaughlin and Kalodner, *Circuit Judges*.

ORDER

Appellee's time for filing petition for rehearing is extended to March 27, 1959.

By the Court,

McLAUGHLIN

Circuit Judge.

Dated: March 13, 1959.

IV.

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING DATED APRIL 2, 1959

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 12,575

United States of America,

Appellant

v.

Delaware, Lackawanna & Western Railroad Company

SUR PETITION FOR REHEARING

Present: Biggs, *Chief Judge*, and McLaughlin and Kalodner, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,

Circuit Judge

Dated: April 2, 1959

FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 15 1959
Clerk

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:	
Anderson-Tully Co. v. *United States*, 189 F. 2d 192, certiorari denied, 342 U.S. 826	8, 9
Bear Gulch Placer Mining Co. v. *Walsh*, 198 Fed. 351	8
Bibb County, Georgia v. *United States*, 249 F. 2d 228	8, 9
Norfolk & O. V. Ry. Co. v. *Consolidated Turnpike Co.*, 111 Va. 131, affirmed, 228 U.S. 596	7
Old Dominion Co. v. *United States*, 269 U.S. 55	6
Searl v. *School District, Lake County*, 133 U.S. 553	7
United States v. *Certain Parcels of Land in Warren County*, 90 F. Supp. 27	9
United States v. *Five Parcels of Land in Harris County, Texas*, 180 F. 2d 75, certiorari denied, 340 U.S. 812	8, 9
United States v. *Smith*, 110 Fed. 338	8
Miscellaneous:	
34 A.L.R. 1083	7
L.R.A. 1916F 980	7
II Lewis, *Eminent Domain* (3d ed. 1909), Sec. 759 (Sec. 507 in 2d ed.)	7

513836—59

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 136

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court, printed in the Joint Appendix at pp. 412a–438a, is reported at 154 F. Supp. 770. The opinion of the Court of Appeals (Pet. App. 1–9) is reported at 264 F. 2d 112.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1959 (Pet. App. 10). A timely petition for rehearing was denied on April 2, 1959 (Pet. App. 13). The petition for a writ of certiorari was filed June 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on condemnation, the United States must pay the enhanced value of property resulting from improvements made by a lessee who was under contract with the United States to lease property, improve it and manufacture munitions, the United States reimbursing the lessee in full for its expenses in making the improvements.

STATEMENT

The United States instituted this condemnation proceeding in August, 1954, to acquire 15.3 acres of land and improvements owned by the Delaware, Lackawanna and Western Railroad Company in Scranton, Pennsylvania (J.A. 4a). The property was part of the petitioner's terminal facilities and had been used for the repair of steam locomotives. Since conversion to Diesel engines, the area and structures were surplus to the Company (J.A. 401a, 416a).

In January, 1953, about 19 months prior to this proceeding, the property was leased by United States Hoffman Machinery Corporation for use as a plant to manufacture large calibre artillery shells for the Korean War (J.A. 318a, 330a). Under Hoffman's contracts with the Government it was to find a suitable location, lease it, make the necessary alterations and installations and produce the shells. The United States had to approve the site and the terms of the lease, reimburse Hoffman item-by-item for all expenses incurred in adapting the property to that use and then pay a sum which would cover the lease rental, cost of materials and a profit to Hoffman

(J.A. 193a, 198a, 338a, 342a, 403a). The lease was for an initial term of 15 months at $500,000 with the right to renew for four additional years at an annual rental of $400,000 (J.A. 324a–325a). As the lease terms discussed in some detail *infra* show, the petitioner was advised of the Government's interest in the transaction. At the same time, and as a condition to approval of the lease by the Government, the petitioner granted to the Government an option to purchase the property after one year for the sum of $2,000,000 (J.A. 341a–349a).

Hoffman entered upon the premises and made extensive and costly alterations (new roofs, floors, walls, black top, etc.) for which it was reimbursed by the Government (J.A. 385a, 403a, 417a). After the initial term, the lease was renewed for a year pursuant to its provisions. Within that period the Government filed this proceeding to condemn the fee and a declaration of taking with a deposit of $860,000 as estimated just compensation (J.A. 4a–13a).

At the trial on valuation before three commissioners, the Government contended that the property must be valued as of the date of the filing of the declaration of taking, but in the physical condition that existed before the alterations and improvements. The ground given was that, under numerous decisions, the Government may not be required in a condemnation action to pay again for improvements which it has made and which the landowner never owned. The commissioners overruled this contention (J.A. 404a–405a).

Accordingly, valuations were made on behalf of the petitioner ranging from $2,000,000 to $4,000,000 (J.A.

387a–392a). The Government set the value at $1,000,000 (J.A. 394a). A witness for the petitioner who valued the property at $2,250,000 testified that the improvements had enhanced the property by about $250,000 (J.A. 159a–160a, 373a). The Government's valuation included $300,000 for such enhancement (J.A. 263a, 373a, 394a). The commissioners awarded $1,720,000 (J.A. 404a) and the district court, rejecting the Government's contention, affirmed the award (J.A. 412a–438a).

On appeal by the Government, the court below found error in allowing compensation for the improvements and reversed (Pet. App. 6–11). It reached that result on two independent grounds: (1) the terms of the lease were express in retaining ownership of the improvements in the Government and (2) it is settled law, in the absence of lease terms to the contrary, that a condemnor does not pay the value of improvements which it had added to the property.

ARGUMENT

The petitioner urges that it should be paid for the improvements because their value was "expressly contracted for as part of the consideration for leasing petitioner's property" (Pet. 6) and because they were fixtures incorporated into the realty (Pet. 8). Those contentions are contradicted both by the terms of the lease and by established law.

1. The lease provides that the lessee "may: (1) remodel and renovate the demised premises" (Art. 8th; J.A. 328a); and it "will keep and maintain the demised premises in good order and condition, and

will make all necessary repairs thereto, including necessary painting thereof, in a good and workmanlike manner" (Art. 19th; J.A. 336a); that "Title to property furnished Lessee by the United States government shall not be affected by the incorporation or attachment thereof in or to the demised premises, nor shall such property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to the demised premises" (Art. 26th; J.A. 338a); that "upon termination" lessee shall "surrender the same to Lessor in good order, condition and repair (reasonable wear and tear excepted), removing * * * all other property (including property furnished by the United States * * *) placed, installed or constructed upon or affixed to the demised premises by Lessee" and that "if the removal of any such property [furnished by the United States] shall cause structural damage * * *, Lessee will repair the same so as to put the premises into either substantially the condition existing prior to the installation of such removed property, reasonable wear and tear excepted, or in equally good serviceable condition * * *" (Art. 29th; J.A. 339a–340a).

Thus, as the court of appeals held (Pet. App. 7), the petitioner was entitled to receive back at the term's end no more than what it delivered at the beginning. Materials incorporated in or attached to the property were not part of the consideration paid for the lease[1] and did not become part of the realty.

[1] The annual rental paid to the petitioner ($400,000) was 20% of the price the petitioner put on the fee ($2,000,000) in granting the option to purchase at the time of the lease. This

At the time of the filing of the declaration of taking in these proceedings, title to none of the improvements had passed to the petitioner. The situation is the same as that in *Old Dominion Co. v. United States*, 269 U.S. 55, where the Government had entered upon land under lease and erected warehouses with the right to remove them within 30 days after termination of the lease. Within that 30-day period the Government instituted a condemnation proceeding. The statute authorizing condemnation required exclusion from just compensation of any allowance for improvements made by the Government. In refusing such compensation, this Court said (p. 65):

> * * * But upon this issue the statute was superfluous. When these proceedings were begun the buildings belonged to the United States.

Articles 8th and 9th of the lease (J.A. 328a–330a), on which the petitioner relies as covenants by the lessee to remodel and renovate the property for the advantage of the lessor (Pet. 7–8), are in fact the provisions permitting the lessee to make necessary changes to adapt the property to fulfill the purpose of leasing it, namely the manufacture of munitions. On the other hand, the provisions of Article 19th (J.A. 336a) and 29th (J.A 339a–340a) dealing with repairs and the return of the property at the conclusion of the lease are nothing more than the usual lease provisions for maintenance of leased property in the condition in which it was received, reasonable wear and tear excepted. The petitioner's claim that

---

fact is hardly compatible with the notion that additional consideration for the lease was contemplated.

these provisions give it any rights to enhanced value is groundless.

2. As the court below held (Pet. App. 8–9), the same result would be reached under settled law even if the terms of the lease were not express. The "overwhelming case law" (34 A.L.R. 1083; L.R.A. 1916F 980) is that improvements made during a prior occupancy of land by the Government or a corporation possessing the power of eminent domain do not become part of the land in the sense that their value is to be considered in determining the compensation to be awarded the landowner in a subsequent condemnation proceeding. The principle rests on the doctrine of unjust enrichment and, additionally, where the Government is concerned, upon the view that compensation must be "just, not merely to the individual whose property is taken, but to the public which is to pay" it, and that "The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual * * *." *Searl* v. *School District, Lake County*, 133 U.S. 553, 562. To pay the landowner for an enhancement solely created by expenditures from the Treasury enriches him to the corresponding detriment of the taxpayer.

In *Norfolk & O. V. Ry Co.* v. *Consolidated Turnpike Co.*, 111 Va. 131, affirmed under reversed title, 228 U.S. 596, the Virginia court quoted from II Lewis, *Eminent Domain* (2d ed.), Sec. 507 (also cited in this Court's affirming opinion as Sec. 759 (3d ed.)), as follows:

> Indemnity, in the case supposed, does not include the value of the works prematurely placed upon the property. The owner has not lost the value of such works; but, if their value is given to him, it is so much in excess of his loss; which is something never contemplated by the constitution.

In *Bibb County, Georgia* v. *United States*, 249 F. 2d 228, 230 (C.A. 5), where the Government had not removed its improvements prior to termination of the lease, the court said that "it would be a clear perversion of justice to permit the invocation of the dry as dust legal principles as to fixtures" "to require a gift of the value of the improvements to the landowner. See also *Anderson-Tully Co.* v. *United States*, 189 F. 2d 192, 196 (C.A. 5), certiorari denied, 342 U.S. 826; *Bear Gulch Placer Mining Co.* v. *Walsh*, 198 Fed. 351, 355 (D. Mont.); *United States* v. *Smith*, 110 Fed. 338, 340 (E.D.N.Y.). The general public has an interest in the improvements and the structures are not dedicated to the use of the freehold but to a public use.

The decisions relied upon by the petitioner (Pet. 6, 10) do not support its contentions. *United States* v. *Five Parcels of Land in Harris County, Texas*, 180 F. 2d 75 (C.A. 5), certiorari denied, 340 U.S. 812, did not deal with structural improvements on the property. The court said (p. 75): "No one questions the right of the United States to remove structural improvements and facilities, and no attempt is made to obtain payment for such improvements or facilities."[2] The case dealt

[2] The decision further accords with the present case in treating improvements made by a contractor as having been made, in effect, by the United States.

with enhanced value as a result of "dredging, filling, and leveling" of the land to create a channel and shipyard (pp. 77–78). There was extensive testimony that the low rental could not be justified except that such improvement to the property was intended to be one of the "fruits of the leases other than annual rentals" (p. 76). Thus, the *Five Parcels* case differs materially on the facts from the present case and does not constitute a conflict among circuits because it is not the rule in the Fifth Circuit as to structural improvements or improvements on the land which are involved here.

Moreover, we agree with the court below that the opinion is erroneous in announcing a distinction between improvements on and to the land, without a clear agreement in the lease to that effect, because the reasons behind the rule leave no opening for such a distinction. The later unanimous decisions in the same circuit in *Anderson-Tully* and *Bibb County, supra,* indicate that it has adopted the general view of the dissenting judge in the *Five Parcels* case.

In *United States* v. *Certain Parcels of Land in Warren County,* 90 F. Supp. 27, 29 (W.D. Va.), cited by petitioner, the lease allowed the Government to alter the property and then provided: "All such alterations, additions, structures, fixtures, and improvements *except* walks, service driveways, underground utilities (and appurtenances), and roads, shall be and remain the property of the Government and may be removed by the Government prior to or within a reasonable time after the expiration of this Lease." (Emphasis added.) The court held (p. 33)

that the landowners thereby became vested with a fixed interest in the improvements which were listed in the above-quoted exception. There is no comparable provision in the lease in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys.

JULY 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959